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Attorneys for Plaintiffs/Counter-Defendants, LARGO CONCRETE, INC. and N.M.N. CONSTRUCTION, INC.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

LARGO CONCRETE, INC., a California Corporation; N.M.N. CONSTRUCTION, INC., a California Corporation.

Case No. C07-04651 CRB (ADR)  
*The Hon. Charles R. Brever*

**EX PARTE APPLICATION FOR:**

- 1) STAY OF ALL PROCEEDINGS PENDING  
DISPOSITION OF LARGO'S PETITION  
FOR WRIT OF MANDAMUS; and**
  
  - 2) RULINGS ON LARGO'S OBJECTIONS TO  
EVIDENCE PRESENTED BY LMF IN  
SUPPORT OF ITS MOTION TO  
DISQUALIFY ROXBOROUGH,  
POMERANCE & NYE**

**[Declaration of Michael L. Phillips, Esq. Filed  
and Served Concurrently Herewith]**

Complaint filed: September 10, 2007

## AND RELATED COUNTERCLAIM

**TO THIS HONORABLE COURT, DEFENDANTS, AND TO THEIR ATTORNEYS OF RECORD:**

Plaintiffs/Counter-Defendants, LARGO CONCRETE, INC. and N.M.N. CONSTRUCTION, INC. (hereinafter “Largo”), submits the following *Ex Parte* Application for:

- 1) Order granting a stay of all proceedings pending disposition of Largo’s Petition for Writ of Mandamus seeking reversal of the District Court’s granting of LIBERTY MUTUAL FIRE INSURANCE COMPANY’s (hereinafter “LMF”) motion to disqualify Roxborough, Pomerance & Nye (“RPN”) from representing Largo in this matter;

1           2) Rulings on Largo's Objections to evidence submitted by LMF in support of its motion to  
2           disqualify Roxborough, Pomerance & Nye from representing Largo in this matter.

3           This Application is made pursuant to Paragraph 4 of the Hon. Charles R. Breyer's Standing  
4 Order and is based upon the Memorandum of Points and Authorities filed in support hereof, the  
5 Declaration of Michael L. Phillips, Esq., and on the pleadings and other documents on file in this  
6 matter.

7 DATED: January 29, 2008

Respectfully submitted,

8 ROXBOROUGH, POMERANCE & NYE LLP

9 By:

10           NICHOLAS P. ROXBOROUGH, ESQ.  
11           MICHAEL L. PHILLIPS, ESQ.  
12           Attorneys for Plaintiffs/Counter-Defendants,  
13           LARGO CONCRETE, INC. and N.M.N.  
14           CONSTRUCTION, Inc.

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           **I.     INTRODUCTION**

3           As the plaintiff in this action, Largo filed this action on September 10, 2007 alleging that LMF  
 4 breached the terms of insurance policies issued to Largo between 2002 and 2004, as well as the implied  
 5 covenant of good faith and fair dealing by grossly mishandling claims made by employees of Largo  
 6 injured during these policy periods. There is no trial date set for this matter. On October 23, 2007  
 7 LMF filed a motion to disqualify Roxborough, Pomerance & Nye from representing Largo in this  
 8 matter based on an alleged conflict of interest between LMF and an associate at RPN, Craig Pynes.  
 9 Following oral argument, by Order dated December 31, 2007 this Court granted LMF's motion to  
 10 disqualify RPN. This Order was electronically served on January 2, 2008. (A copy of the Court's  
 11 Order granting LMF's motion to disqualify RPN is attached to the Declaration of Michael L. Phillips  
 12 as Exhibit "B"). Largo will seek review of this Order by Petition for Writ of Mandamus to be filed  
 13 with the Ninth Circuit as soon as practicable.

14           This Application seeks an Order from this Court granting a stay of all proceedings pending  
 15 disposition of Largo's Petition for Writ of Mandamus and setting forth the Court's rulings on Largo's  
 16 Objections to evidence submitted by LMF in support of its motion to disqualify RPN from representing  
 17 Largo in this matter.

18           **II.    NOTICE TO OPPOSING COUNSEL**

19           On January 29, 2008, Largo's counsel notified counsel for LMF of Largo's intent to file this ex  
 20 parte application. Declaration of Michael L. Phillips, ¶2. LMF's counsel's contact information is as  
 21 follows:

22           Frank Falzetta, Esq.  
 23           [ffalzetta@sheppardmullin.com](mailto:ffalzetta@sheppardmullin.com)  
 24           Scott Sveslosky, Esq.  
 25           [ssveslosky@sheppardmullin.com](mailto:ssveslosky@sheppardmullin.com)  
 26           SHEPPARD MULLIN RICHTER & HAMPTON LLP  
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 Fax: (213) 620-1398

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28           ///

1       **III. ARGUMENT**

2       **A. A STAY IS APPROPRIATE IN ORDER TO PRESERVE THE STATUS QUO**  
 3       **PENDING DISPOSITION OF LARGO'S PETITION FOR WRIT OF**  
 4       **MANDAMUS.**

5           Largo's Request to stay these proceedings pending disposition of its Petition for Writ of  
 6       Mandamus should be granted because the balancing of equities weighs heavily in favor of such a stay.  
 7       The standard in the Ninth Circuit for ruling on motions for stays pending appeal is comparable to that  
 8       used to evaluate a motion for preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9<sup>th</sup> Cir.  
 9       1983). The equitable criteria to be evaluated are 1) the likelihood of success on the merits, 2) the  
 10      possibility of irreparable injury to plaintiff if the preliminary relief is not granted, 3) a balance of  
 11      hardships favoring the plaintiff, and 4) in some cases, advancement of the public interest. *Los Angeles*  
 12      *Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200-1201 (9<sup>th</sup> Cir. 1980). In  
 13      making a determination under these factors, the relative hardships to the parties is the critical  
 14      component: "If the balance of harm tips decidedly towards the plaintiff, then the plaintiff need not  
 15      show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Benda v.*  
 16      *Grand Lodge of Intern. Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9<sup>th</sup> Cir. 1978).

17       **1. Applying the *Bauman* Factors, Largo Is Likely To Succeed On The Merits**

18           A Party seeking a stay or injunction pending appeal need only show that it may prevail on the  
 19      merits. *Gilder v. PGA Tour, Inc.* 936 F.2d 417, 422 (9<sup>th</sup> Cir. 1991). It is likely Largo will prevail on  
 20      the merits of its Petition for Writ of Mandamus based on the *Bauman* factors. The Ninth Circuit has  
 21      identified the following five factors to aid the court in assessing the propriety of mandamus relief in a  
 22      given circumstance: 1) Whether Petitioner has any other means to attain the desired relief; 2) Whether  
 23      Petitioner will be damaged or prejudiced in a way not correctable on later appeal; 3) Whether the  
 24      district court's order is clearly erroneous as a matter of law; 4) Whether the district court's order is a  
 25      reoccurring error or manifests a persistent disregard of the federal rules; and 5) Whether the district  
 26      court's order raises new and important problems or issues of first impression. *Bauman v. United States*  
 27      *Superior Court*, 557 F.2d 650, 654-655 (9<sup>th</sup> Cir. 1977); *Miller v. Gammie*, 335 F.3d 889, 895 (9<sup>th</sup> Cir.  
 28      2003). A Petitioner need not satisfy all five factors in order to justify granting of its mandamus  
 petition. *Star Editorial, Inc. v. United States Dist. Ct., Central Dist. California*, 7 F.3d 856, 859 (9<sup>th</sup>

1 Cir. 1993). In fact, it is unlikely that all of the factors will be present in any one case, rather, a  
 2 determination of whether a writ should issue often requires a careful balancing of conflicting factors.  
 3 *San Jose Mercury News, Inc. v. United States Dist. Ct., N.D. California*, 187 F.3d 1096, 1103 (9<sup>th</sup> Cir.  
 4 1999).

5                   **a.        Largo Has No Other Means To Obtain The Relief Desired**

6                   An Order granting a motion to disqualify counsel is not subject to immediate appeal.  
 7 *Richardson-Merrell, Inc. v. Koller*, 472 US 424, 426, 433-436 (1985); *In re Grand Jury Investigation*,  
 8 182 F.3d 668, 670 (9<sup>th</sup> Cir. 1999). However, under certain circumstances, a ruling on a motion to  
 9 disqualify counsel may be reviewable by petition for writ of mandamus. *Christensen v. United States*  
 10 *Dist. Ct.* 84 F.2d 694, 696-699 (9<sup>th</sup> Cir. 1988). As such, Largo's only present avenue to review this  
 11 court's order granting LMF's Motion to Disqualify RPN is by way of a petition for writ of mandamus.

12                  **b.        Largo Will Be Damaged In A Way That Is Not Correctable On**  
 13                   **Appeal**

14                  The area of workers' compensation bad faith claims mishandling is of recent vintage, involves  
 15 specialized strategies, the application of specialized privileges, and special trial and appellate  
 16 experience. Largo sought the advice and representation of RPN based on RPN's specific and well  
 17 established skill and expertise in this area. A client deprived of the attorney of his or her choice suffers  
 18 a particularly "harsh result" where his or her attorney is highly skilled in the relevant area of the law.  
 19 *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300.

20                  LMF is well aware of the importance of retaining counsel that is skilled in the relevant area of  
 21 law. In fact, instead of retaining their Liberty corporate lawyers in the Largo case (Susan Olson,  
 22 Melodee Yee, and Lisa Kralik Hansen) Liberty selected the services of a firm who had over 15 years of  
 23 experience and skilled in this specialized area, Sheppard Mullin, Richter and Hampton ("SMRH"). It  
 24 is undisputed that this Los Angeles department of SMRH attorneys are experienced in this specialized  
 25 area of law and have been very successful defending Liberty, as well as other large workers'  
 26 compensation insurance carriers, in this specific area for over 15 years. In fact, other than RPN, it is  
 27 doubtful any other firm has prevailed against SMRH at the trial or appellate court level in a case that  
 28 involved allegations of workers' compensation bad faith claims mishandling.

1       The fact is, LMF retained specific Los Angeles attorneys from SMRH who are experts in this  
 2 unique area of law to represent them in San Francisco. Preventing Largo from being represented by  
 3 equally skilled Los Angeles counsel will cause Largo to be damaged in a way that is not correctable  
 4 on appeal. The right of a party to be represented in litigation by specialized and experienced attorneys  
 5 of its choice is a significant right and ought not to be abrogated in the absence of some indication that  
 6 the integrity of the judicial process will otherwise be injured. *Oaks Management Corp. v. Superior*  
 7 *Court* (2006) 145 Cal.App.4<sup>th</sup> 453, 472. Indeed, if this court's order granting LMF's Motion to  
 8 Disqualify RPN was in error, Largo will be damaged in such a way that is not correctable on appeal  
 9 because it will be irreparably deprived of its right to expert counsel of its choice during the trial of this  
 10 case. *Cole v. United States Dist. Ct. for Dist. of Idaho* 366 F.3d 813, 820 (9<sup>th</sup> Cir. 2004). While  
 11 Liberty gets to keep their specialized lawyers at SMRH, Largo's sole avenue to seek review of this  
 12 court's order, without suffering irreparable damage, is by way of a petition for writ of mandamus.  
 13 When disqualification is ordered, "once a new attorney is brought in, the effect of the order is  
 14 irreversible." *Christensen*, 844 F.2d at 697.

15                     c.     The District Court's Order Raises Important Problems Or Issues  
 16                     Of First Impression That Need To Be Addressed By The Court Of  
Appeal.

17       As this Court acknowledged in *Hitachi*, there is a shift taking place in California towards  
 18 acknowledging the implementation of ethical walls. *Hitachi, Ltd. v. Tatung Co.* (N.D.Cal. 2006) 419  
 19 F.Supp.2d 1158, 1164. The most prominent case demonstrating this trend is *People ex rel. Dept. of*  
*Corporations v. SpeeDee Oil Change Systems, Inc.*, (1999) 20 Cal. 4th 1135, 1139. In that case, as  
 21 this Court acknowledged in *Hitachi*, the Court left open the possibility that effective screening  
 22 procedures can rebut the presumption of shared confidences within a firm. Largo respectfully  
 23 believes that this Court's Order failed to take into consideration "the shift" taking place in California,  
 24 as well as the current status of today's legal culture. In today's legal culture, attorneys are extremely  
 25 mobile. Whereas the average attorney practicing 20 years ago may have worked for one or two  
 26 employers, today, attorneys will typically hold positions with five to ten employers during their legal  
 27 career. It is for this reason Courts should be applying the modified substantial relationship test to  
 28 assure that attorneys are only subjected to disqualification when an actual conflict exists such that the

1 firm-switching attorney possess confidential information and the former client has a legitimate  
 2 concern that such confidential information will be conveyed to the new firm. Such a rule is  
 3 synonymous with the purpose of the rules regarding attorney disqualification. For this reason, the  
 4 issues that will be presented in Largo's Petition for Writ of Mandamus represent new and important  
 5 issues that are facing many attorneys, law firms, and as a result, the Courts.

6                   d.     **The District Court's Order Is Erroneous As A Matter Of Law**

7                   Largo respectfully believes that the Court erred by failing to apply the modified substantial  
 8 relationship test to determine whether or not a conflict of interest exists that would subject RPN to  
 9 disqualification. The Court's Order holds that the modified substantial relationship test "only applies  
 10 when the lawyer with the alleged conflict never provided any legal services to the client in a  
 11 substantially related matter or otherwise." (emphasis added). Memorandum and Order Re: Motion to  
 12 Disqualify at Page 5. Largo respectfully believes that such a holding is incorrect and that under *Ochoa*  
 13 v. *Fordel*, the modified substantial relationship test applies when (1) there is no proof that the firm-  
 14 switching attorney actually obtained confidential information to the underlying case during the course  
 15 of the prior attorney-client relationship; (2) there is a successive representation of clients with adverse  
 16 interests; and (3) a firm-switching attorney whose prior attorney-client relationship with the moving  
 17 party was peripheral or attenuated. (emphasis added.) *Ochoa v. Fordel* (2007) 146 Cal.App.4th 898,  
 18 908. There is no requirement that the lawyer with the alleged conflict never provided any legal  
 19 services to the client in a substantially related matter or otherwise.

20                   Based on the above, Largo respectfully believes that this Court should have applied the  
 21 modified substantial relationship test because 1) there is no proof, admissible or otherwise, even  
 22 accepting the evidence submitted by LMF as true, that Craig Pynes actually obtained any information  
 23 confidential to any Liberty entity material to WCBF litigation, and 2) his prior attorney-client  
 24 relationship with any Liberty entity was peripheral and attenuated from the unique area of WCBF  
 25 litigation, specifically recognized by this Court.

26                   In addition, Largo respectfully believes that this Court failed to hold that the ethical wall  
 27 created by RPN includes appropriate screening measures to adequately protect any alleged legitimate  
 28 interests of LMF. The Court in *In re County of Los Angeles* held that proper ethical screening

1 procedures can rebut a presumption of shared confidential information. *In re County of Los Angeles*  
 2 223 F.3d at 995-996 (9<sup>th</sup> Cir.2000). If ever the circumstances existed such that an appropriate ethical  
 3 wall could be erected, it is here. LMF has no legitimate confidential interests to be protected. Any  
 4 alleged "confidential" information Craig allegedly had access to, or obtained, prior to joining RPN,  
 5 was already in the possession of RPN for years and thus RPN should not have been disqualified.

6           **2. Without A Stay This Is Not A Fair Fight And Largo Will Suffer**  
 7           **Irreparable Injury If The Stay Is Not Granted**

8           LMF concedes this case involves a very unique and specialized area of law. As discussed  
 9 above, LMF has abandoned their general defense counsel in cases like this in favor of retaining  
 10 specialized attorneys from the Los Angeles office of SMRH. Largo should not be denied the same  
 11 opportunity without recourse. The right of a party to be represented in litigation by specialized and  
 12 experienced attorneys of its choice is a significant right and ought not to be abrogated in the absence of  
 13 some indication the integrity of the judicial process will otherwise be injured. *Oaks Management*  
 14 *Corp.* 145 Cal.App.4<sup>th</sup> at 472. The herein request is to allow Largo an equitable and fair opportunity to  
 15 seek review of this Court's Order prior to being forced to prosecute this action with counsel other than  
 16 its counsel of choice against SMRH.

17           **3. The Balance Of Hardships Favors Largo**

18           LMF will suffer little or no hardship or prejudice if a continuance is granted pending the  
 19 disposition of Largo's Petition for Writ of Mandamus. LMF sought to seek disqualification of RPN in  
 20 this matter. In doing so, they were well aware such a tactic could result in a delay of litigation. Any  
 21 delay that may occur as a result of Largo availing itself of its right to seek appellate review on this  
 22 issue should have been expected by LMF and is not something that will in any way cause it undue  
 23 hardship. On the other hand, as discussed above, this stay is necessary to allow Largo an opportunity  
 24 to seek review of this Court's Order prior to being forced to prosecute this action with inferior counsel  
 25 against LMF, who has retained counsel with substantial experience in this specialized area of law. The  
 26 fact that LMF will suffer little or no hardship, the level of hardship that will be suffered by Largo if this  
 27 stay is not granted heavily tilts the balance of hardships in favor of Largo. As such, a stay should be  
 28 granted.

1           **B. LARGO REQUESTS A RULING ON EVIDENTIARY OBJECTIONS MADE**  
 2           **TO EVIDENCE SUBMITTED BY LMF IN SUPPORT OF ITS MOTION TO**  
 3           **DISQUALIFY RPN.**

4           In connection with the Largo's Opposition to LMF's Motion to Disqualify RPN, Largo  
 5 submitted objections to evidence submitted in support of LMF's Motion. In addition, Largo submitted  
 6 further objections to evidence submitted in conjunction with LMF's Reply brief. The Ruling by the  
 7 Hon. Charles R. Breyer on LMF's Motion does not include a ruling on either set of objections to  
 8 evidence. Largo respectfully request that the court rule on those evidentiary objections so that there is  
 a clear record on appeal. The evidentiary objections were as follows:

9           **1. Objections to Evidence Submitted In Support of LMF's Motion**

10           **a. Declaration of Lisa Kralik Hansen**

11           Largo objected to each and every paragraph of the Declaration of Lisa Kralik Hansen  
 12 ("Hansen") based on Evidence Code Sections 402, 403, 602, 802, and 805 in that it is irrelevant, based  
 13 on speculation, is vague and misleading, lacks personal knowledge and/or is based on hearsay, is  
 14 inherently weak, and is not the best evidence available.

15           **b. Declaration of Melodee Yee**

16           Largo objected to each and every paragraph of the Declaration of Melodee Yee ("Yee") based  
 17 on Evidence Code Sections 402, 403, 602, 802, and 805 in that it is tantamount to perjury, is  
 18 irrelevant, is based on speculation, is vague, lacks personal knowledge and/or is based on hearsay, is  
 19 inherently weak, and is not the best evidence available.

20           **2. Objections to Evidence Submitted In Support of LMF's Reply Brief**

21           **a. General Objections**

22           Largo objected to each and every declaration submitted in conjunction with LMF's Reply to  
 23 Largo's Opposition on the grounds that any evidence contained within such declaration should have  
 24 been presented in conjunction with LMF's moving papers. The evidence submitted in support of  
 25 LMF's moving papers was limited to the very limited, conclusory statements contained with the  
 26 Declarations of Lisa Hansen and Melodee Yee. LMF should not be permitted to wait until filing its  
 27 Reply to submit an additional TEN declarations and preclude Largo from addressing the contents of  
 28 those declarations.

1                   **b.        Specific Objections**

2                   **1)      Declaration of Greg Farkas**

3                   Largo objected to Paragraphs 2 and 5 of the Declaration of Greg Farkas on the grounds that  
4 Exhibits "B" and "F" described therein were not provided for Largo's review.

5                   **2)      Declaration of Hector Barba**

6                   Largo objected to Paragraph 2 of the Declaration of Hector Barba based on Evidence Code  
7 Sections 402 and 403 on the grounds that the statements contained therein are irrelevant, conclusory,  
8 and misleading.

9                   **3)      Declaration of William Cupelo**

10                  Largo objected to Paragraphs 3 and 4 of the Declaration of William Cupelo based on Evidence  
11 Code Sections 402 and 403 on the grounds that the statements contained therein are irrelevant and  
12 misleading.

13                  **4)      Declaration of Ron Skocynec**

14                  Largo objected to Paragraphs 4, 5, and 6 of the Declaration of Ron Skocynec based on  
15 Evidence Code Sections 402, 403 and 602 on the grounds that the statements contained therein lack  
16 foundation and are irrelevant and misleading.

17                  **5)      Supplemental Declaration of Scott Sveslosky**

18                  Largo objected to Paragraphs 6, 7, 8, and 10 of the Supplemental Declaration of Scott  
19 Sveslosky based on Evidence Code Sections 402, 403, and 602 on the grounds that the statements  
20 contained therein lack foundation and are irrelevant and misleading.

21                  **6)      Declaration of Frank Falzetta**

22                  Largo objected to Paragraph 3 of the Declaration of Frank Falzetta based on Evidence Code  
23 Sections 402 and 403 on the grounds that the statements contained therein are irrelevant and  
24 misleading.

25                  **7)      Declaration of Greg Brisee**

26                  Largo objected to Paragraphs 1 and 2 of the Declaration of Greg Brisee based on Evidence  
27 Code Sections 402 and 403 on the grounds that the statements contained therein are irrelevant and

28                  ///

1 misleading.

2 **IV. CONCLUSION**

3 LMF will suffer little or no hardship, the level of hardship that will be suffered by Largo if this  
4 stay is not granted is high, and Largo is likely to succeed on the merits of its Petition for Writ of  
5 Mandamus. As such, based on the foregoing, Largo respectfully request this Court issue an order  
6 staying this action in its entirety pending disposition of Largo's Petition for Writ of Mandamus. In  
7 addition, in order to allow Largo to present a clear record to the Ninth Circuit, this Court should render  
8 rulings on Largo's evidentiary objections to evidence submitted by LMF in support of its motion to  
9 disqualify.

10 DATED: January 29, 2008

ROXBOROUGH, POMERANCE & NYE LLP

11 By:

12 NICHOLAS P. ROXBOROUGH, ESQ.  
13 MICHAEL L. PHILLIPS, ESQ.  
14 Attorneys for Plaintiffs/Counter-Defendants,  
15 LARGO CONCRETE, INC. and N.M.N.  
16 CONSTRUCTION, Inc.

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**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) SS

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 5820 Canoga Avenue, Suite 250, Woodland Hills, California 91367.

**On January 29, 2008, I served the foregoing documents described as:**

**EX PARTE APPLICATION FOR: 1) STAY OF ALL PROCEEDINGS  
PENDING DISPOSITION OF LARGO'S PETITION FOR WRIT OF  
MANDAMUS; and 2) RULINGS ON LARGO'S OBJECTIONS TO EVIDENCE  
PRESENTED BY LMF IN SUPPORT OF ITS MOTION TO DISQUALIFY  
ROXBOROUGH, POMERANCE & NYE**

on the interested party(ies) in this action listed below:

Frank Falzetta, Esq.  
Scott Sveslosky, Esq.  
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**ATTORNEYS FOR DEFENDANT**  
**LIBERTY MUTUAL FIRE INSURANCE  
COMPANY**

- BY ELECTRONIC MAIL:** I caused such documents listed above to be transmitted via e-mail to each of the parties on the attached service list at the e-mail address as last given by that person on any document which he or she has filed in this action and served upon this office.

**BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the offices of the each addressee(s).

**FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **January 29, 2008**, at Woodland Hills, California.

  
Kim Schwarz